Supreme Court, U.S.
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No. 01-578

In The

Supreme Court of the United States

WILLIAM R. WHITE, JOHN G. GREENWOOD, RICHARD H. SCHLOBOHM, ROBERT D. SAMPSON, DAVID E. DAUM, MARTIN A. GRANO, WILLIAM M. VANDERSLICE, and BORJE H. VAGENIUS, individually and on behalf of others,

Petitioners,

versus

SUNDSTRAND CORPORATION, SUNDSTRAND CORPORATION RETIREMENT PLAN-INDUSTRIAL, BARBARA J. KRAMER, DOUGLAS EBLEN, PLAN BENEFIT COMMITTEE, JAMES F. RICKETTS, KENNETH EITENMILLER, HAZEN TUCK, PLAN APPEAL REVIEW COMMITTEE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

During the pendency of this case, Sundstrand Corporation was acquired by United Technologies Corp (a NYSE Listed company) and its name was changed to Hamilton Sundstrand Corporation.

The United Technologies SEC Form 10K for 2000 includes the following information as Exhibit 21 thereof:

"Exhibit 21
SUBSIDIARIES OF THE REGISTRANT

The companies listed below are direct or indirect subsidiaries of the Registrant. Their names and jurisdictions of incorporation are as follows:

Entity Name	State/Country of Incorporation
Ardco, Inc.	Illinois
Cade Industries, Inc.	Wisconsin
Carrier Air Conditioning Pty. Limited	Australia
Carrier Corporation	Delaware
Carrier Ltd.	South Korea
Carrier Mexico S.A. de C.V.	Mexico
Carrier S.A.	France
Carrier S.p.A.	Italy
Carrier Singapore (PTE) Limited	Singapore
Carrier-Espana, SA	Spain
CEAM Srl	Italy

CORPORATE DISCLOSURE STATEMENT – Continued

China Tianjin Otis Elevator Company, Ltd.	China
Eagle Services Asia Private Limited	Singapore
Elevadores Otis Ltda.	Brazil
Empresas Carrier, S.A. De C.V.	Mexico
Evans Lifts Limited	United Kingdom
Generale Frigorifique	France
Hamilton Sundstrand Corporation	Delaware
Hamilton Sundstrand Pacific Aerospace, Inc.	Singapore
Hamilton Sundstrand Power Systems, Inc.	Delaware
Helicopter Support, Inc.	Connecticut
Homogenous Metals Inc.	New York
ICP International Holdings Inc.	Cayman Islands
Johns Perry Lifts Holdings	Cayman Islands
LG-Otis Elevator Company	South Korea
Microtecnica SRL	Italy
Milton Roy Company	Pennsylvania
Miraco Development Services & Trading Company, S.A.E.	Egypt
Nevada Bond Investment Corp II	Nevada
Nippon Otis Elevator Company	Japan
Otis FranceOtis Elevator Company (H.K.) Limited	Hong Kong
Otis Elevator Company [New Jersey]	New Jersey
Otis Elevator Company Pty. Ltd.	Australia
Otis G.m.b.H. & Co. OHG	Germany
Otis Investments Plc	United Kingdom
Otis S.p.A. ItalyPratt & Whitney Canada Corp.	Canada
Pratt & Whitney Component Solutions, Inc.	Michigan

CORPORATE DISCLOSURE STATEMENT – Continued

Pratt & Whitney Compressor Airfoil Holdings, Inc.	Delaware
Pratt & Whitney Engine Services, Inc.	Delaware
Pratt & Whitney Export, Inc.	Delaware
Pratt & Whitney Holdings LLC	Cayman Islands
Pratt & Whitney Power Systems, Inc.	Delaware
Pratt & Whitney Services, Inc.	Delaware
Profroid Industries S.A.	France
Ratier Figeac S.A.	France
Sikorsky Aircraft Corporation	Delaware
Sikorsky Export Corporation	Delaware
Sikorsky International Operations, Inc.	Delaware
Sirius (Korea) Ltd.	United Kingdom
Springer Carrier S.A.	Brazil
Sullair Corporation	Indiana
Sundstrand Pacific Acquiring PTE Ltd.	Singapore
Sundyne Corporation	Delaware
The Carmel Forge Limited	Israel
The Express Lift Company Limited	United Kingdom
The Falk Corporation	Delaware
Turbine Overhaul Services PTE LTD	Singapore
Tyler Refrigeration Corporation	Delaware
United Technologies Electronic Controls, Inc.	Delaware
United Technologies International Operations, Inc.	Delaware
Zardoya Otis, S.A.	Spain

CORPORATE DISCLOSURE STATEMENT – Continued

Other subsidiaries of the Registrant have been omitted from this listing since, considered in the aggregate as a single subsidiary, they would not constitute a significant subsidiary."

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I. RESPONDENTS' STATEMENT OF THE CASE

A. Parties. Petitioners, former Sullair senior executives, sued Sundstrand Corporation ("Sundstrand"), its Pension Plan (the "Plan"), two plan committees (the "Committees") and present or former Sundstrand employees who served on the Committees.

B. Relevant Non-Parties. Sullair Corporation ("Sullair") began the Plan in 1981. After it was acquired by Sundstrand in November 1984, Sullair remained a separate corporation and continued as plan sponsor with Committee appointment authority until 1994 when Sundstrand assumed such responsibilities. Sullair appointed the Committee that made the pivotal 1985 ESOP Offset interpretation challenged by Petitioners. Compensation payments at issue were paid by Sullair before the acquisition.

Until 1986, the Plan was funded through Bankers Life ("Bankers") and Bankers performed benefit calculations and other actuarial services, including preparation of annuity rate tables. In early 1985 Bankers initiated a review of the methodology to be used in calculating the ESOP Offset. Bankers raised the issue as a case of first impression after it reviewed the first internal calculations of deferred vested benefits under the Plan (actuarial calculations for 1984). Bankers concluded its internal staff had utilized an improper immediate annuity rate table for ESOP Offset calculations related to deferred vested benefits.[1] As part of this interpretive process, Bankers prepared the deferred annuity rate table that was approved by the Plan Benefit Committee in May of 1985.

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[1] Vested benefits payable in the future to participants who have not yet attained retirement age are referred to as "deferred vested" benefits, as contrasted to retirement benefits that are immediately payable.

The Committee is expressly authorized to rely on such actuarial advice and tables under the terms of the Plan.

C. **The Claims Below.** Petitioners asserted four categories (and numerous subcategories) of claims, most as class claims. At heart, this action challenged pension calculations.

1. **Benefit Claims (Count I).** Petitioners claimed: (i) Five categories of Plan compensation were undercounted;[2] (ii) a flawed methodology was used for an ESOP Offset; and (iii) a higher interest rate should apply to certain corrections. In pre-litigation ERISA claims deliberations, the Committees denied some claims (a claim that profit sharing payments count as compensation under the pre-1984 version of the Plan, an ESOP Offset claim and an interest rate claim) and granted the other compensation claims (except a phantom stock claim not asserted under the Plan's ERISA claim procedures). Benefit records were corrected to reflect the areas of agreement.[3] Despite approval of many claims and these

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[2] Count I alleged undercounting of: (i) profit sharing paid to participants terminating after 1983 (in addition to the pre-1984 Plan issue described below); (ii) relocation allowances; (iii) mortgage assistance or moving expenses; (iv) directors' fees; and (v) phantom stock. Count I also alleged unspecified other FICA earnings were excluded.

[3] Corrections agreed to for the eight Petitioners resulted in an average of a 343 percent upward adjustment in their pensions. An average lump sum correction payment of $55,052 was paid to the four Petitioners whose benefits were already in pay status. The prior corrections were not limited to the Petitioners. The record reflects there was an extensive, and successful, effort to correct the records inherited from non-party Sullair to recapture data regarding compensation paid over 15 years previously, and the resulting pre-litigation upward adjustment of the benefits of hundreds of participants.

corrective actions, Petitioners filed a complaint including both disapproved and approved claims.

2. Other Claims (Counts II-IV). Petitioners also asserted: (i) various breaches of fiduciary duties (Count II) relating to the determinations of their benefits that were the subject of Count I; (ii) a Committee decision regarding one participant was retaliation under 29 U.S.C. §1140 for statements that he would encourage others to pursue similar claims (Count III); and (iii) various reporting or disclosure obligations were performed in a tardy or incomplete fashion (Count IV).

D. District Court Decisions.

1. FRCP 12 Dismissals & Related Ruling. The District Court dismissed the Appeal Review Committee and it members from Count IV and accepted Petitioners' representations that various Counts were not actually directed at all Respondents. These rulings were not appealed. This ruling left the following categories of claims pending:

Defendant	Benefit Count	Fiduciary Count	Retaliate Count	Reporting Count
Sundstrand		X	X	X
Plan	X			
Plan Com., Kramer & Eblen		X	X	X
Appeal Com., Ricketts, Eitenmiller, & Tuck		X	X	

2. **Class Certification.** FRCP 23(b)(2) Classes were certified with respect to only one compensation claim (Class A solely regarding the pre-1984 Plan Profit Sharing claim) and the ESOP Offset claim (Class B). All other class proposals were rejected. Pet. App., pp. 72a-73a. This ruling was not appealed.[4]

3. **Relevant Evidentiary Rulings.** The District Court denied Respondents' motions aimed at excluding evidence concerning the advice of attorneys G. William Porter ("Porter") and David Ellis ("Ellis"). R. 79; Pet. App., pp. 30a-31a.

4. **Summary Judgment.** In granting a comprehensive summary judgement, the District Court held: (i) Count I compensation claims (except the pre-1984 Plan Profit Sharing Class A claim) were moot (uncontroverted evidence of pre-litigation concurrence and corrections regarding directors' fees, mortgage assistance, moving expenses and profit sharing under post-1983 Plan versions) or were waived (vague and unspecified nature of the allegations relating to phantom stock and other FICA compensation); (ii) there was no material issue regarding the reasonableness of the Committees' interpretations regarding pre-1984 Plan Profit Sharing claims (Class A),

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[4] During a status conference the parties agreed with the District Court that notice to absent class members was not required by *Jefferson v. Ingersoll International, Inc.*, 195 F.3d 894 (7th Cir. 1999), because the remedies sought were exclusively equitable. R.127. As permitted by S.Ct. Rule 12(7), Respondents refer herein to the Record by reference to the number on the District Court's official Docket. Thus for example, "R.127" refers to item 127 in the Record.

the ESOP Offset claims (Class B) and the corrective interest rate claims of Count I (interpretation not unreasonable and thus not arbitrary and capricious); (iii) the fiduciary claims of Count II were benefit claims not maintainable under the 29 U.S.C. §1132(a)(3) under *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (because of opportunity to assert the claims under 29 U.S.C. §1132(a)(1)(B)); (iii) the 29 U.S.C. §1140 retaliation claim of Count III (failure to exhaust administrative remedies and because the claim failed to implicate an employment relationship as required by controlling precedents); (iv) material issue found regarding one defense to the reporting and disclosure claims of Count IV insufficient because no material issue regarding Petitioners' inability to demonstrate that the violations, if proven, would be technical and (under prevailing precedents) not a basis for the monetary relief being sought (uncontroverted evidence that any violations were without bad faith or detrimental reliance and did not involve active concealment). Pet. App., pp. 33a-53a.

In weighing the ESOP Offset claim, the District Court expressly considered evidence relating to the advice of Porter and Ellis despite Respondents' privilege objections, but concluded that the evidence failed to support the claim. Pet. App., pp. 44a-46a.

5. Taxation Of Costs. The Court awarded taxable costs, but reduced Respondents' claim from $45,291.97 to $17,893.55. The Court rejected an argument that *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991), prevents assessment of the entire award against the named Plaintiffs and rejected a contention that failure to pursue

absent class members constituted a waiver of cost claims against the named Plaintiffs. Pet. App., pp. 16a-18a.

6. Motion To Vacate. The Court refused to vacate the judgment under FRCP 60(b)(2)&(3). R. 244.

E. Seventh Circuit Affirmance. De novo, the Seventh Circuit held that the District Court correctly applied the arbitrary and capricious standard and went further, in *dictum*, to state that on this record it would have reached the same interpretation of the ESOP Offset Plan provision if a deferential standard were not applicable. Pet. App., p. 9a. That Court also held that the pre-1984 Plan explicitly excluded profit sharing, as the Committees and the District Court had also concluded. Pet. App., p. 10a.

In an opinion by Judge Easterbrook, the author of *Rand*, the Circuit Court held that *Rand* is limited to FRCP Rule 23 and has no bearing on the allocation of taxable costs. The Court found it an illogical application of the entirely separate taxable costs statute to expect prevailing defendants to absorb their own expenses simply because a no-notice class was certified. The Court also agreed there was no waiver. Pet. App., pp. 11a-13a.

The refusal to vacate was also upheld. Pet. App., p. 10a.

II. REASONS FOR DENYING THE WRIT

A. Decisions Below Do Not Raise The Issues Presented When Petitioners' Misstatements Are Disregarded.

1. Contrary To Petition, The Courts Considered The Plan Provisions And Found They Supported The Committee Profit Sharing And ESOP Offset Interpretations. Petitioners assert the Courts below upheld the Committee interpretations of the ESOP Offset and the exclusion of profit sharing under the pre-1984 Plan without considering the Plan language.[5] Pet., pp. i, 10, 11. Petitioners assert that the lower courts failed to find the language ambiguous and therefore should have accepted Petitioner's version of the "plain meaning" of the contested provisions. Pet., pp. i, 10, 11.

To the contrary, the District Court explicitly found the ESOP Offset provision ambiguous. In deferring to the Committees' interpretation of an ambiguity, the Court stated:

> Plaintiffs argue the ESOP offset amount has been improperly calculated because defendants are valuing the portion of the benefit provided by the Sullair ESOP by using a deferred annuity rate, in the case of deferred vested participants,

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[5] Petitioners also allege the Committees did not consider the Plan language, Pet., p. 13, an unfounded allegation directly contradicted by the Record. R.115, ¶¶104-05, 125-26, 197-200, 202-05 & 209-221; R.130, ¶¶104, 125-26, 199-200, 202, 209-10, 212-19 & 221; R.102-2, Tab.C-2, Exs.30-32, Tab.C-3, p. 000005, Exs.5, 8 & 13; R.102-1, Tab.B-1, p. 177, ll. 6-24, 174-84, p. 185, ll. 1-8, Tab.B-10, p. 65, ll. 5-16, p. 66.

> instead of using an immediate annuity rate, as is used for participants who start getting their benefits immediately. . . . It is clear from section 4.02(c) that the Pension Plan documents (both the 1981 and 1984 versions) are silent on this issue; in other words, section 4.02(c) does not use either "immediate" or "deferred." See, e.g., Def. Exh. C(3), Eitenmiller dep. exh. 13, Bates No. 002518-20 (noting Plan documents do not specify use of immediate or deferred annuity factors). In these circumstances, plaintiffs face a formidable hurdle in trying to show the interpretations of the Plan Benefit Committee and Appeal Review Committee are downright unreasonable. . . .

Pet. App., pp. 40a-41a (some Record and all case law citations omitted).

The Seventh Circuit went further. After reviewing the general purpose and function of Floor-Offset plans and affirming the finding that the Committees' interpretive decisions regarding the ESOP Offset was not arbitrary and capricious, the Court added in *dictum*: "and we would have reached the same construction as an independent matter if review were plenary." Pet. App., p. 9a.

Both Courts found the same plain meaning of the pre-1984 Plan Profit Sharing exclusion as did the Committees. The District Court's opinion set forth verbatim and discussed the profit sharing exclusion provision that Petitioners now claim it did not consider. Pet. App., pp. 36a-39a. That Court concluded that:

> Plaintiffs also argue the Appeal Review Committee acted unreasonably in rejecting White's explanation that the 1981 Plan's exclusion of

> bonus payments under Sullair's cash profit sharing plan meant bonus payments Sullair's President paid at his discretion, but did not mean profit sharing paid out quarterly according to an established formula. (Compl. P 31; LR56.1(a) P 100). However, plaintiffs have completely failed to produce any evidence showing the Appeal Review Committee acted unreasonably in rejecting this interpretation. On the contrary, the plain language of the 1981 Plan supports the committee's ratiocination. The 1981 Plan excludes "***any*** bonus payments" under Sullair's "cash profit sharing plan," which is broad, exclusionary language. . . .

Pet. App., p. 39a.

The Seventh Circuit agreed:

> Plaintiffs did receive some profit-sharing payments and contend that these should be included in the base used to calculate the defined-benefit amount, but the plan documents explicitly exclude this possibility, as the district court correctly held.

Pet. App., p. 10a.

In their first "Question" and in subsequent discussions of the standard of review, Petitioners allude to a related argument advanced below. Pet., pp. i & 13-14. They argued below that the Sullair-appointed committee's 1985 ESOP Offset interpretation was a change in the Plan by Sundstrand which could only be made by a formal Plan amendment because the alleged inconsistency between that interpretation and Petitioner White's version of the prior intent of the Plan. If these allusions are a restatement of this argument, it suffers from the

fatal flaw that it presumes the plain meaning of the ESOP Offset provision is both evident and contrary to the meaning consistently assigned to that provision by the Committee with the advice of its actuary.[6] Moreover, this discredited argument rests upon the Petition's misstatement that the Courts below failed to at least find the provision ambiguous. Pet., p. 10.

2. Contrary To Petition, Attorney Advice Evidence Was Available To Petitioners And Considered Below, But Did Not Support Petitioners' Contentions. Petitioners assert that the Courts below failed to consider evidence offered by Petitioners regarding the legal advice of attorneys Porter and Ellis. Pet., pp. i & 10-12. They offer two inconsistent explanations for the alleged failure to properly weigh this evidence. In portions of the Petition they suggest the Porter Letter and information about Ellis were not available to them.[7] Pet., pp. 7-8 & 12. Elsewhere

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[6] The Plan expressly authorizes the Committees to rely on the Plan's actuary. R.115, ¶205; R.74, Ex.A, §8.01; R.11, Ex.B, §8.01.

[7] Petitioners also repeat a discredited claim they were not warned in advance that Porter himself disagreed with their interpretation of the Porter Letter. The Porter affidavit was responsive to the new issues raised when Petitioners introduced the Porter Letter as the centerpiece of their Summary Judgment Response. Before Petitioners filed this response they were given fair warning in a formal offer of proof filed by Respondents and in statements made by counsel in open court (prior to Petitioners' use of the Porter Letter) that Porter disagreed with Petitioners' interpretation of his letter and would be a witness. R.121, ¶16; R.139, pp. 5-9 & Ex.J; R.177, ¶¶9-25; R.156, pp. 3-15 & Exs.A-G. Petitioners also misstated the record regarding the disclosure of the Porter Letter and the timing and circumstances of Porter being identified as a potential witness. *See* arguments reflected in R.177, ¶¶9-25 (incorporated herein by reference).

they imply that the Courts below improperly treated such evidence as beyond the administrative record when they evaluated the Committees' interpretive decisions. Pet., pp. i & 10-12.

In fact Petitioners had the Porter Letter they quote from and they deposed Ellis and reviewed his notes as well as the chronology they prefer to utilize. They offered this evidence to the District Court with their Summary Judgment Response filings and quoted from them liberally in those submissions. Moreover, although Respondents attempted to persuade the District Court to exclude evidence concerning Porter and Ellis as attorney client privilege, both these items of evidence were considered for purposes of the summary judgment rulings even though Respondents persist in their belief they were

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By admitting the Porter Affidavit, the Court gave recognition to the fact that Respondents' bona fide claim of privilege prevented earlier preparation and submission of an affidavit. This was particularly the case since it was not known when the Summary Judgment motion was filed that Porter could be a witness and Respondents had provided Petitioners with the "heads up" regarding the substance of Porter's views before Petitioners chose to use the Porter Letter in their response filed six months later. Having defeated Respondents' claim of privilege regarding Porter, in a sharply contested motion, it is unseemly for Petitioners to suggest his affidavit was somehow barred by his decades old representation of Sullair, a non-party. In any event, the District Court's admission of the Porter Affidavit (part of an extensive evidentiary ruling that excluded a quantity of other evidence offered by Respondents) was not arbitrary and capricious. *Kalis v. Colgate-Palmolive Co.*, 231 F.2d 1049, at 1055 (7th Cir. 2000); *Adusumilli v. City of Chicago*, 164 F.3d 353, at 369 (7th Cir. 1988).

beyond the scope of the administrative record of the Committees' decisions.

The District Court admitted the Porter Letter, concluding there was an issue of fact whether the Committee was aware of the letter when it made its 1985 decision interpreting the ESOP Offset provision. Pet. App., p. 31a. However, after considering the letter as a part of the administrative record, the Court concluded that it did not even speak to the interpretive issue Petitioner relied upon it to support:

> Plaintiffs assert, without support, that Porter's letter addresses the use of deferred versus immediate annuity rates, and is disagreeing with Bankers' Life's recommendation. However, this is not apparent from a reading of the letter.

Pet. App., p. 46a.

The District Court also considered evidence offered by Petitioner about Ellis' advice in the form of the chronology draft by an in-house attorney quoted in the Petition but concluded that:

> plaintiffs offer absolutely no evidence what a vague reference to "all issues discussed" or "claims" meant. White won the bulk of his claims, and Ellis could have been referring to those claims. Plaintiffs' argument is based on sheer speculation and is rejected. *Pettit v. Retrieval Masters Creditors Bureau, Inc.*, 211 F.3d 1057, 2000 WL 558945, at *3 (7th Cir. 2000) (at summary judgment stage nonmoving party must do more than merely speculate).

Pet. App., p. 46a.

In support of this conclusion, the Seventh Circuit opined that the Plan's terms and the Committees' discretionary judgments were controlling regarding the ESOP Offset issue "not who said (or wrote) what to whom many years ago." Pet. App., p. 10a (referring to the 1985 Porter Letter). Thus, this case does not actually present this court with a lower court's refusal to consider legal advice evidence beyond the administrative record as Petitioners assert, although Respondents persist in their belief that excluding such evidence would have been entirely proper.

3. Contrary To Petition, The Courts Properly Considered Whether to Apply a Sliding Scale Modification to *Firestone* Deference. Petitioners ask for a review of "conflict of interest" or "actual bias" case law. Petitioners argue the Courts below failed to consider or properly apply these "sliding scale" cases to alter the *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) deferential standard. Specifically, they contend the Courts should have applied a more skeptical standard in response to Petitioners' allegations of an animus towards Petitioner White, based upon two uncomplimentary documents dated from the year after the final interpretations. Pet., pp. 8-9 & 12-14.

In fact the District Court considered this bias evidence, but found it irrelevant and insufficient to trigger a sliding scale shift:

> Plaintiffs point to a memo Eblen wrote and a memo Quick wrote as evidence of bias. (LR56.1(b)(3)(B) P 3, 29) The court finds neither is sufficient to raise a question of material fact about whether defendants' interpretation of the

> Pension Plan is arbitrary and capricious. Eblen's memo was written in 1997, approximately two years after the Plan Benefit and Appeal Review Committees decided his claim. As for Quick's memo, although he states White was "carping," he also acknowledges White won the bulk of his pension appeal. The memo simply is not evidence of actual bias under these circumstances.

Pet. App., p. 47a.

Not only did the District Court properly consider and reject the "actual bias" sliding scale modifications to the *Firestone* deferential standard, but the Seventh Circuit made it clear the deferential standard of review was not even critical to the outcome. That Court expressly stated it would have reached the same interpretation of the ESOP Offset as did the Committees even in a plenary *de novo* review. Pet. App., p. 9a. No form of reduced sliding scale deference could be more skeptical than a full blown *de novo* review. *A fortiori,* remand for application of a sliding scale deferential standard would achieve nothing.

Moreover, the Courts below did in fact apply the sliding scale approach correctly when they considered the bias evidence and determined that it did not change the outcome.

4. Fiduciary Claim *De Novo* Review. Petitioners assert their fiduciary claims were not addressed *de novo*. Pet., pp. i & 14-15. They ask this Court to ignore the actual basis for the dismissal of their fiduciary claims (Count II), the impropriety of using 29 U.S.C. §1132(a)(3) to assert a benefit claim where 29 U.S.C. §1132(a)(1)(B) is fully available. Pet. App., p. 49a. This is a backdoor attempt to continue asserting benefit claims under the

guise of a fiduciary claim in a manner contrary to *Varity*. 516 U.S. at 515.

In proceedings below, Petitioners used an alternative approach towards this same goal of circumventing the *Varity* limitations. In their reply brief before the Seventh Circuit, Petitioners asserted they had the right to seek individual benefits in a fiduciary breach action under 29 U.S.C. §1132(a)(2) or under 29 U.S.C. §1104 standing alone. Reply p. 13. This argument runs directly contrary to other express guidance from this Court in *Russell* and *Varity*, in which this Court expressly stated that 29 U.S.C. §1132(a)(2) is not available for the recovery of individual benefits because limiting language in 29 U.S.C. §1109 makes it clear that 29 U.S.C. §1132(a)(2) only functions as a jurisdictional basis for fiduciary actions relating to the plan's financial integrity. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 144 (1985); *Varity*, 516 U.S. at 509 & 515.

Either approach, if adopted, would not only jettison the 29 U.S.C. §§1132(a)(2) & (a)(3) limitations this Court has recognized, but would effectively overturn the deferential review required by *Firestone*. Either approach would eliminate the distinction between benefit and fiduciary claims. Given the carefully designed and interrelated structure of 29 U.S.C. §1132, this would be an astounding and unjustified usurpation of the role of Congress. *Alexander v. Sandoval*, 532 U.S. 275, ___, 121 S.Ct. 1511, 1519-20 (2001); *Russell*, 473 U.S. at 144 & 146-47. If such judicial legislating is ever warranted (which is doubtful), this is not the case.

5. Phantom Stock. Petitioners seek to survey class members to uncover phantom stock claims. Petitioners imply there is such a class and Petitioners are the representatives. Pet., pp. i & 18.

No such class was certified. Thus, the named Petitioners' phantom stock claims were individual claims. They failed to even allege they had received relevant phantom stock payments. Respondents doubt anyone has such a claim. Only compensation in 1980 and later years counted and Respondents believe (based upon the records from non-party Sullair) that no Sullair employees received such payments during the years in question. R.115, ¶¶183-87; R.130, ¶¶18-87; R.102-1, Tab.B-7, p. 43, ll. 12-17; R.102-2, Tab.B-17, p. 28, ll. 12-15; R.102-2, Tab.B-16, p. 27, ll. 12-18, p. 70, ll. 12-24, p. 71, ll. 1-24; R.102-2, Tab.B-20, p. 27, ll. 10-17; R.102-1, Tab.A-2, ¶8. In any event, the demise of Petitioners' individual phantom stock claims has no bearing on the claims of others.

B. The Decisions Below Do Not Present a Conflict. Petitioners assert that the decisions below conflict with various cases or new theories they urge on this Court. Pet., pp. 12-15. However, each such conflict contention rests upon the misstatements described above.

If this Court were to examine the Record it would find that, contrary to these conflict claims: (i) even if *Finley v Special Agent's Mutual Benefit Ass'n, Inc.*, 957 F.2d 617, 620 (8th Cir. 1992) is given the suggested reading, Pet., p. 13, there is no conflict because the Committees and the Courts below in fact based their decisions on the terms of the Plan and acted in a manner consistent with the plain meaning of the profit sharing exclusion and did

not act unreasonably in resolving ambiguities under the ESOP Offset provision; (ii) even under the sliding scale view advanced by Petitioner, Pet., p. 14, the District Court properly concluded that the bias evidence was irrelevant and insufficient to establish actual bias; (iii) whether or not the District Court's review of materials beyond the administrative record regarding Porter and Ellis was proper, considering such evidence was in accordance with, not in conflict with, the gloss Petitioners urge this Court to place upon the administrative record cases they cite, Pet., p. 12; (iv) the findings that such legal advice material fails to support Petitioners, that the profit sharing exclusion provision explicitly supports the Committees' interpretations, that the ESOP Offset provision is ambiguous and that the Committees' interpretation of that language was consistent over time, consistent with actuarial advice, consistent with the general function and purpose of Floor-Offset plans and generally was not otherwise unreasonable demonstrate that the decisions below in no way conflict with the standard of review cases cited by Petitioners, Pet., pp. 13-14; and (v) in the face of controlling precedents from this Court described above, the *de novo* review of statute or law interpretation cases cited by Petitioners, Pet., p. 15, can have no bearing on simple Plan benefit interpretations.

C. The Decisions Below Were Correct.

1. ESOP Offset Interpretation, With Which The Seventh Circuit Expressed Plenary Agreement, Was Correct. The Plan was established in 1981 as a defined benefit

Floor-Offset plan under which participants' pension benefits, if any, would supplement their benefits from a preexisting employee stock ownership plan ("ESOP").[8]

This coordination between the two plans was accomplished through the ESOP Offset feature. The relevant ESOP Offset provision of the 1981 and the 1984 Plans stated that:

> (c) The amount of monthly pension which could be provided on a straight life annuity basis by application of an amount equal to the fair market value as of such specified date of the Participant's vested interest in the balances credited to his accounts under the Sullair Corporation Employee Stock Ownership Plan [of SULLAIR CORPORATION,] and for this purpose, such amount of monthly pension shall be determined on the basis of the annuity purchase rates in effect as of such specified date under and as set forth in the Group Contract.

R.74, §4.02; R.11, §4.01 (bracketed phrase in 1984 version; first reference to Sullair all caps in the 1984 version).[9]

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[8] It was anticipated that the ESOP would serve as the primary retirement plan and that some participants would have a zero benefit under the Plan due to the offset. R.115, ¶193; R.130, ¶193; R.102-2, Tab.B-22, p. 43, ll. 7-24, pp. 44-46, p. 47, ll. 1-18, pp. 108-112, p. 113, ll. 1-20.

[9] Although the wording has changed slightly in subsequent versions of the Plan, all named Plaintiffs are covered by the 1981 and 1984 versions and the subsequent changes have not altered the language in a manner which has significance to this dispute, even as to class members covered by later versions of the Plan.

The parties agree the ESOP Offset calculations mathematically convert a participant's ESOP account balance as of his or her employment termination date to an equivalent annuity amount beginning at the time the participant's pension benefits are scheduled to be paid. This hypothetical, ESOP-funded, annuity is the amount that can be purchased with the ESOP account using an annuity rate table. It is at this point in the calculation that the agreement ends.

Petitioners contend "annuity purchase rates" must be read to refer to immediate annuity rates, not deferred annuity rates, regardless of when the participant's pension benefit is scheduled to commence. Respondents contend that the annuity amount that can be purchased with the ESOP account balance is determined using an immediate annuity rate table only if the participants' pension can begin at employment termination (*e.g.*, in the case of early or normal retirement). If the pension is not scheduled to begin until a deferred vested benefit commencement date, then Respondents contend the annuity that can be purchased with the ESOP account balance is determined using a deferred annuity rate table provided by Bankers.

This disagreement and the precise methodology actually employed may be simply described as follows:[10]

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[10] Petitioners' expert agreed with these steps other than the use of a deferred annuity rate table when actual benefit entitlement is deferred (Step 7). He agreed the ESOP Offset is designed to determine the annuity that could actually be purchased as of the participant's employment termination date with the balance in his or her ESOP account and this provision

Step 1: **Monthly Average Compensation.**[11]

Step 2: **Base Monthly Compensation and Excess Monthly Compensation.** Monthly average compensation is divided into base average compensation (the first $400) and excess average compensation (the excess over $400).

Step 3: **Sum of Base Accrual And Excess Accrual.** The $400 Base Average Compensation Amount is multiplied by 1.0% and the Excess Average Compensation Amount is multiplied by 1.5%. Gross accrual amount is the sum.

Step 4: **Credited Service.**

Step 5: **Gross Monthly Benefit Accrual Before ESOP Offset.** Gross monthly accrued benefit before the ESOP Offset is the product of Steps 3 and 4.

Step 6: **ESOP Balance.** Participant's ESOP balance is determined at employment termination date.

Step 7: **ESOP Offset Annuity Factor.**[12] The annuity factor is determined at employment termination.

"means" you "take into account the fair market value of the ESOP as of the date of his termination" and it is correct to say that provision then requires a determination of "what annuity it would buy." R.121, Ex.H, p. 111, ll. 18-24, p. 112-114, p. 115, ll. 1-21, p. 120, ll. 2-24, p. 121, ll. 1-4.

[11] As described above, the parties disagree over whether or not profit sharing payments should be counted under the 1981 version of the Plan.

[12] As described above, while the parties agree that the annuity rate is priced at the date of employment termination and that an immediate annuity rate used at that time for persons who are retiring at normal or early retirement, the parties disagree concerning the use of deferred annuity rates at such date in the case of deferred vested participants.

The annuity rate is priced at the date of employment termination by using: (i) immediate annuity rate table *at that time* for persons who are retiring at normal or early retirement; and (ii) deferred annuity rate table is used *at that time* in the case of deferred vested participants (*i.e.*, whose benefit cannot begin to be paid currently because, although vested, they do not qualify for immediate benefit commencement on account of early retirement).

Step 8: **ESOP Offset.** ESOP Offset is product of Step 6 (ESOP Balance) divided by Step 7 (ESOP Offset Annuity Factor from appropriate table).

Step 9: **Net Monthly Benefit.** Net monthly benefit payable in the normal form commencing at scheduled benefit commencement date is the difference (not less than zero) resulting from subtracting ESOP Offset (Step 8) from Gross Monthly Benefit Before ESOP Offset (Step 5).

E.g, R.102-1, Tab.A-1, ¶¶9-10 & Exs.C-Q.

As described above, the issue of the appropriate annuity rate table was first raised by Bankers in connection with a review of its own actuarial procedures under the Plan when the Plan was new. Bankers raised this issue of first impression and recommended that deferred annuity rates were appropriate since the pension being offset was a deferred annuity beginning years in the future not an immediate annuity beginning soon. R.115, ¶¶195-97; R.102-1, Tab.A-1, ¶¶9-10 & Exs.C-E. Bankers advised that using immediate rates for deferred annuities would produce an unintended windfall since the marketplace uses different rates in currently pricing future (or deferred) annuities than are used for currently pricing immediate

annuities. R.102-1, Tab.A-1, Exs.E & H; R.115, ¶¶197-200; R.130, ¶¶199-200.

After an exchange of correspondence seeking clarification of Bankers' recommendation and seeking (and receiving) a set of deferred annuity rate tables prepared by Bankers for the purpose, the Plan Benefit Committee met to decide the issue in May of 1985. After considering the advice of Bankers, including the deferred annuity tables prepared by Bankers for this purpose, the Plan Benefit Committee decided on May 2, 1985 that the reference to purchase rates in the case of benefits commencing in the future requires the use of the deferred annuity tables.[13]

Contrary to the District Court's consideration of the Porter Letter, there is no evidence to suggest that the Committee was aware of the Porter Letter. In any event, as Porter himself has testified, Petitioner misstates his letter when they claim he opined about the immediate versus deferred rate issue. In an affidavit, Porter testified the language from the Porter Letter relied upon by Petitioner merely refers to the "entirely separate issue" of the timing of determination of the participant's ESOP

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[13] The Committee reviewed the Plan language, relied on the advice of the Plan's actuary, Bankers, and relied upon the annuity rate tables and methodologies issued by Bankers under the Annuity Contract. R.115, ¶¶197-200 & 202-05; R.130, ¶¶199-200 & 202; R.102-1, Tab.B-1, p. 177, ll. 6-24, 174-84, p. 185, ll. 1-8; R.102-1, Tab.B-10, p. 65, ll. 5-16, p. 66; R.102-2, Tab.C-2, Exs.30-32. The Plan expressly authorizes the Committees to "rely upon all tables, valuations, certificates and reports furnished by the consultant or actuary appointed by the Plan Administrator." R.115, ¶205; R.74, Ex.A, §8.01; R.11, Ex.B, §8.01.

account balance date of determination issue (Step 6), not the immediate versus deferred annuity rate issue (Step 7). R.154, Tab. F, ¶8.

This methodology has been applied consistently since, including in the 1995 deliberations a decade later which are the subject of this case. R.115, ¶¶206-21; R.130 ¶¶206, 208-10, 212-19 & 221; R.102-1, Tab.A-1, ¶¶9-10 & Ex C-Q, Tab.B-10, p. 65, ll. 5-16, p. 66, Tab.B-1, p. 178, ll. 14-19, 180, ll. 14-23, p. 183, ll. 10-24, p. 184; R102-2, Tab.C-3, Exs.5, 8 & 13.

2. Profit Sharing Exclusion Interpretation, Which Both Courts Found Consistent With Explicit Plan Provisions, Was Correct. Before 1984, the Plan read:

> . . . AVERAGE COMPENSATION. . . . Pay as used in this definition means the amount of compensation subject to tax for Social Security benefits without regard to the dollar limitation on such compensation subject to FICA taxes, ***excluding any bonus payments under the Employer's cash profit sharing plan.*** . . .

R. 74, §1.02 (emphasis added).

The Appeal Review Committee expressly based its rejection of the pre-1984 Plan profit sharing claims on the italicized phrase. That Committee noted that this provision "had consistently been taken to mean any and all payments from the profit sharing plan" and that the interpretation was consistent with "Plan communications" and "consistent administration." R.115, ¶¶104-05, 125-26; R.130, ¶¶104, 125-26; R.102-2, Tab.C-3, p. 000005.

3. Refusal To Extend *Rand*'s Pro Rata Approach Appropriately Avoids a Legislative Intrusion. Petitioners suggest it is unduly burdensome to impose joint and several liability on them for approximately $18,000 in taxable costs. Yet Petitioners passed up the opportunity afforded them under 28 U.S.C. §1920 to offer the District Court evidence of an extreme inability to pay those taxable costs. Absent such evidence, that Court was without any evidence upon which to base such a finding in variance from the presumptive operation of 28 U.S.C. §1920. *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1410 (7th Cir. 1991) (prevailing parties benefit from a "strong presumption" that they are entitled to have the Court assess their fair and reasonable taxable cost).

Instead the Petitioners chose to claim a spurious entitlement to avoid the bulk of the taxable expenses assessable by the operation of 28 U.S.C. §1920 by operation of a previous Seventh Circuit interpretation of FRCP 23. *Rand*, 926 F.2d at 598-601. Respondents submit that their failure to assert an inability to pay reflects what has been obvious to all parties throughout this litigation. As retired former top executives of a public company, the named Petitioners are well able to bear the modest taxable cost award entered in this action. In any event, 28 U.S.C. §1920 and FRCP 54(d) specify a procedure for variance from the presumptive outcome of 28 U.S.C. §1920, and Petitioners utterly failed to avail themselves of this procedure in mistaken reliance on an entirely different, but unsupportable procedural defense based on *Rand*.

Rand restricted the extent to which named plaintiffs can be required to agree to bear their own side's cost of

prosecuting their claims in order to qualify as appropriate class representatives under FRCP Rule 23(a). Petitioners' reliance on *Rand* was misplaced. The sole issue in that case was the meaning of the adequate representative requirement of FRCP Rule 23. *Rand*, 926 F.2d at 598-99. The issue was whether the named plaintiffs were *per se* disabled from serving as representative Plaintiffs because they were unwilling to agree to pay *all* of the costs of prosecuting the class claims. *Id.* at 599 & 601. The issue of responsibility for defense costs was not before the court in *Rand*. The entire point of *Rand* is that it is acceptable for a class action to be maintained where Plaintiff's counsel accepts the risk that they may not fully recover their own fees and costs from the named plaintiffs. *Id.* at 598-600. *Accord Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995). *See generally* Note, *Developments In The Law – The Paths of Civil Litigation: V. Class Auctions: Market Models for Attorney's Fees in Class Action Litigation*, 113 HARV.L.REV. 1827 (2000); Note, *Attorney Investment in Class Litigation: The Agent Orange Example*, 45 CASE W.RES. 291 (1994); Thomas, Randall S. & Hansen, Robert G., *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 NW.U.L.REV. 423 (1993); Macey, Jonathan R. & Miller, Geoffrey P., *Auctioning Class Action and Derivative Lawsuits: A Rejoinder*, 87 NW.U.L.REV. 458 (1993).

Further, the discussions in *Rand* centered upon a named plaintiffs "agreement" to expend funds and "willingness" to expend funds. These are concepts that make sense in the context of consensual dealings between a client and his or her counsel, but make no sense in the

context of the involuntary imposition of narrow categories of costs incurred by the opposing party after conclusion of a case. *Rand*, 926 F.2d at 598-601.

Thus, nothing about *Rand* compels this Court to apply that case to this action. Despite the important distinctions between *Rand* and this action, Petitioners ask this Court to extend *Rand* to this case and in so doing they ask this Court: (i) to ignore the very different policies that underlay FRCP 23 on the one hand and 28 U.S.C. §1920 and FRCP 54(d) on the other; (ii) to ignore the important procedural and factual differences between Rule 23 and §1920 and Rule 54(d); (iii) to usurp the role of Congress by adding to 28 U.S.C. §1920 qualifying language not present in the plain and unambiguous language of that provision; and (iv) in adopting such a misshapen interpretation of 28 U.S.C. §1920, to ignore applicable cannons of interpretation which would require the opposite result if properly applied.

This Court has considered the extent to which the Federal Rules may be used to affect an outcome otherwise required by §1920 before. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442-45 (1987), this Court refused to permit provisions of the Federal Rules to be used to add to or subtract from the plain meaning of 28 U.S.C. §1920. In that case, the discretionary authority granted by FRCP 54(d) was given effect precisely because it was consistent with 28 U.S.C. §1920. *Id.* at 442. To extend *Rand's* interpretation of the adequate representation requirement of FRCP 23 to change 28 U.S.C. §1920 by adding to its plain language a qualification serving the objectives of FRCP 23 violates the statutory interpretation

guidelines spelled out in *Crawford Fitting*, 482 U.S. at 442-45.

Abrogation of Congress' authority would grant to FRCP 23 (dealing with an entirely different subject matter than does 28 U.S.C. §1920) greater force and effect to vary the Congressionally enacted language of 28 U.S.C. §1920 than the *Crawford Fitting* Court was willing to grant FRCP 54(d) (concerning the same subject matter as 28 U.S.C. §1920).

As pointed out above, when Congress recodified the taxable cost provision as 28 U.S.C. §1920, the class action device already existed. Congress knew how to refer to class actions because the Federal Rules already in place included a version of FRCP 23 with the "adequate representation" requirement. There is nothing in 28 U.S.C. §1920 that says "except as provided in FRCP 23" or "except as provided in future judicial interpretations of FRCP 23." The only possible reading of the statute is that 28 U.S.C. §1920 applies equally to the claims asserted by the Petitioners which were certified as class claims as it does to the balance of their claims which were not so certified and would be fully subject to 28 U.S.C. §1920 even under Petitioners' approach. The special interpretations of FRCP 23 that permit plaintiffs' attorneys to accept the risk they may not be paid or reimbursed for costs, have absolutely nothing to do with the presumptive right of a prevailing defendant to have a small portion of its defense expenditures, taxable costs, automatically assessed as taxable costs, subject only to procedurally proper exercises of judicial discretion consistent with 28 U.S.C. §1920 and FRCP 54(d).

Petitioners' alternative waiver theory presupposes an answer favorable to them on their *Rand* argument, since it presupposes that absent class members have a proportionate obligation that Respondents are able to waive. Therefore, both arguments rest upon Petitioners' misplaced reliance on *Rand*.

In any event, even if this Court agrees with Petitioners, remand would be necessary to distinguish between costs associated with class and non-class claims and to prorate costs associated with class claims.

D. This Case Has No Far-Reaching Implications.

This case offers little to recommend it as a vehicle for explaining the sliding scale modification to *Firestone* deference. The Courts below have made it clear in *dicta* that the level of deference, while procedurally relevant, will not affect the outcome of the two issues before this Court that relate to the sliding scale issue. Both Courts made it clear the plain language of the Plan supported the Committee profit sharing exclusion interpretation. The Seventh Circuit made it clear that if it were reviewing the ESOP Offset issue as a plenary matter it would reach the same interpretive conclusion as did the Committees.

Declining to address Petitioners' fiduciary *de novo* review contentions will have little impact. The contention is so far out of bounds, that passing on this argument is unlikely to foster uncertainty below.

The only novel aspect of this case is Petitioners' attempt to extend *Rand* to taxable cost awards. This issue may warrant this Court's attention at a later date if conflicts develop among the Circuits. There is no such

conflict now and this issue is in its infancy. The issue could benefit from further lower court thought before this Court considers the issue.

III. CONCLUSION

The Profit Sharing exclusion provision plainly supports the decision below. Petitioners failed to raise a material issue of fact below regarding the reasonableness of the Committees' interpretation of the ESOP Offset, which the District Court found to be ambiguous. The Courts below explained why this interpretation was reasonable and why Petitioners' efforts to raise doubts about the reasonableness of that decision failed to raise a material issue of fact.

Petitioners seek to shift the rules of the game previously established by this Court in several significant ways in hopes of convincing this Court of the unreasonableness of the Committee decisions under the relaxed tests they advocate.

These shortcuts, if adopted, would cause grave harm to our voluntary employer sponsored retirement system. There are more than 700,000 ERISA plans covering almost 95 million participants. http://www.dol.gov/dol/pwba/public/programs/opr/bullet97/table___b4.htm; http://www.dol.gov/dol/pwba/public/programs/opr/bullet97/cht___el.htm.

All these plans must operate under ERISA claims procedures which comply with 29 U.S.C. §1133. Fiduciaries with discretionary interpretive authority perform thousands, if not tens of thousands of benefit calculations

on a daily basis. The burden-shifting change advocated by Petitioners would encourage plan participants to routinely seek judicial second opinions.

To be sure, this Court and the Courts whose decisions you are reviewing play an important role in keeping this benefit calculation process honest and setting standards of behavior to be followed by plan fiduciaries. But that role does not, and must not, require the Courts below to second guess reasonable plan interpretations that cannot objectively be viewed as contrary to the plain meaning of the provisions being construed.

This Court does not address a blank slate. This Court and the Department of Labor have issued guidelines for plan fiduciaries describing reasonable decision making practices. Committees properly vested with discretionary authority of the type described in *Firestone* that exercise that discretionary authority in a careful, conscientious and reasonable fashion (as the Committees have in this case), are entitled to expect this Court to follow its own previously enunciated standards.

On these facts, this Court should either deny the Petition outright or issue a summary affirmance under S.Ct. Rule 16.1 if it wishes to provide guidance regarding the taxable costs issue.

Respectfully submitted,

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